



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

May 9, 1996

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Texas Department of Criminal Justice  
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OR96-0686

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code chapter 552. We assigned your request ID# 22849.

The Texas Department of Criminal Justice (the "department") has received several requests for certain payroll records. Specifically, the requestors seek copies of all of the certified payroll records furnished to the department by the sheet metal contractor on the Alberti project in Huntsville. You claim that the requested information is not subject to chapter 552 of the Government Code. In the alternative, you claim that sections 552.101, 552.104, and 552.110 of the Government Code except it from required public disclosure.

As a threshold issue, we address your contention that the requested information is not "public information" subject to the provisions of chapter 552. Gov't Code § 552.021. You contend that the requested information is not subject to chapter 552 because "[i]t is private and proprietary information in the possession of a private person" and because "[t]he information is not created for the governmental body, . . . but rather for the benefit of the contractor." Section 552.021 of the Government Code provides in pertinent part:

(a) Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Thus, chapter 552 will apply to the payroll records if they contain information "collected, assembled, or maintained" by or for the department within the above provision.

Section 2258.021(a) provides that laborers, workmen, and mechanics employed by or on behalf of the state of Texas shall be paid "[n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed." The contractor and each subcontractor are required to keep a record of the actual per diem wages paid to each worker employed on the project, and this record "shall be open at all reasonable hours to the inspection of the public body." *Id.* at § 2258.024; *see id.* § 2258.058 (misdemeanor penalty for non-compliance with statute). The department does not have possession of the records, but it may inspect the payroll information pursuant to this provision of section 2258.024 of the Government Code. The payroll information is not information "collected, assembled, or maintained . . . by" the department within section 552.021(a)(1).

We next consider whether it is the kind of public information described by section 552.021(a)(2) of the Government Code: information "collected, assembled, or maintained . . . for a governmental body and the governmental body owns the information or has a right of access to it." The provision now codified as 552.021(a)(2) of the Government Code was added to chapter 552 in 1989. Acts 1989, 71st Leg., ch. 1248, § 9 at 5023. Open Records Decision No. 558 (1990) interpreted the language now codified as section 552.021(a)(2), stating as follows:

Prior decisions of this office have recognized that a governmental body may contract with a consultant or independent contractor to prepare information for its use in the conduct of official business. See, e.g., Open Records Decision No. 192 (1978). On occasion, the independent contractor has maintained his report and underlying data in his own office, making it available for the governmental body to use without actually having physical custody of the records itself. . . . Where the contractor has prepared information on behalf of a governmental body and makes it available to the governmental body, the information has been held to be subject to the Open Records Act, even though it is not in the governmental body's physical custody. . . .

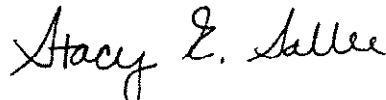
The language added to section 3(a) [by the 1989 amendment] codifies these prior decisions regarding information prepared for a governmental body.

Open Records Decision No. 558 (1990). In concluding that information held for a university by its consultant was subject to chapter 552, this office stated that "the consultant must have acted as an agent of the university in collecting the information." Open Records Decision No. 462 (1987); *see also* Open Records Decision No. 585 (1991) (discussing agency relationship between governmental body and consultant). In this case,

the contractor and subcontractor did not prepare payroll records as agents of the department, but in performance of duties imposed upon them by chapter 2258 of the Government Code. The state's inspection right does not convert the private company's records into public records subject to the provisions of chapter 552. Accordingly, the requested payroll information is not information subject to chapter 552. Of course, if the department makes copies of the contractor's payroll records or takes notes about them in performing its duties under chapter 2258 of the Government Code, those documents will be subject to chapter 552.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

SES/ch

Ref.: ID# 22849

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